testified that he had made every exertion possible to collect it, except to sue upon the bonds; so that, if the warranty of Mrs. Stowers was necessary or even desirable to appellants, they have no one to blame for their failure to get it, except themselves.

The seventh and last assignment of error refers again to the refusal of the court to rescind the contract, and we do not deem it necessary to discuss this question further than has already been done.

Upon the whole case, we are of opinion that the decree of the circuit court should be affirmed.

POCAHONTAS COLLIERIES CO. v. RUKAS' ADM'R.

Supreme Court of Appeals of Virginia.

June 28, 1905.

[51 S. E. 449.]

1. NEGLIGENCE—*Declaration—Right to demand specific statement.*—A declaration charging various grounds of negligence, and averring that each was the proximate cause of the injury complained of, is not demurrable because it leaves defendant ignorant of the particular act of negligence relied on, but defendant, under the express provisions of Va. Code 1904, sec. 3249, may demand a more specific statement of the ground of complaint.
2. DEATH BY WRONGFUL ACT—*Resident alien—Right to recover.*—Va. Code 1904, sec. 2902, providing that when the death of a person shall be caused by the wrongful act of another, and the act is such as would, if death had not ensued, have entitled the injured person to sue therefor, the person guilty of the wrongful act shall be liable to an action for damages, and section 2904, providing that the amount recovered shall be paid to decedent's personal representative, and distributed to the wife, etc., of decedent, authorize an action for the wrongful death of a resident alien, for the benefit of his resident alien widow and children, residing in another state.
3. MASTER AND SERVANT—*Death of employé—Negligence—Evidence.*—Evidence in an action against an employer for the death of an employé employed in a coal mine examined, and *held* to support a finding that the employer was guilty of actionable negligence for failing to warn the employé of the danger in entering the mine because of noxious gases therein.

Error to Circuit Court, Tazewell county.

Action by Anton Rukas' administrator against the Pocahontas Collieries Company. There was judgment for plaintiff, and defendant brings error. *Affirmed.*

J. H. Fulton, for plaintiff in error.

Rucker, Anderson & Hughes, for defendant in error.

WHITTLE, J.

This action was brought to recover damages for the death of plaintiff's intestate, Anton Rukas, which is imputed to the negligence of the defendant.

On the morning of November 14, 1901, Rukas, while at work as a collier in the service of the defendant, in one of its mines located near the town of Pocahontas, was overcome and suffocated by smoke and gases generated from fire in an adjoining mine, and conveyed into the mine in which he was employed through connecting galleries.

There was a verdict and judgment for plaintiff, and the defendant brings error.

The first assignment of error relates to the action of the court in overruling the demurrer to the declaration; the objection being that it charges various grounds of negligence, to each of which the accident is proximately ascribed, thus leaving the defendant unapprised of the particular act of negligence which it is called upon to answer.

This objection affords no sufficient ground for demurrer. It is permissible under the practice in this jurisdiction for the plaintiff to allege any number of distinct acts of negligence, and the defendant may guard against surprise by resort to the provisions of section 3249 of Va. Code 1904, which, in a proper case, entitles him to demand a more specific statement of the real ground of complaint. *City of Richmond* v. *Leaker,* 99 Va. 1, 37 S. E. 348; *Wood* v. *Am. Nat. Bank,* 100 Va. 306, 40 S. E. 931.

The second assignment of error involves the ruling of the court in sustaining the motion of the plaintiff to reject a plea of the defendant which denies the right of the personal representative of a non-resident alien to maintain an action for his death under section 2902 of the Code.

At common law an alien domiciled in a country is entitled to the protection of its laws, and in return therefor owes temporary allegiance to the country of his adoption during the period of his residence. He is subject to the law, as well as entitled to its protection, and is liable to be tried and punished for crime, and may sue

and be impleaded in the proper courts to the same extent as a citizen. The general doctrine is stated thus: "While the rights of aliens depend entirely upon municipal law of the state or nation, or the rights which are given aliens by international law in the United States, except as to certain political and municipal rights to which citizens only are entitled, resident alien friends have practically all and the same rights and privileges as citizens. These rights and privileges include both personal rights, such as the right to dwell safely in the country, and the right of protection to person, reputation and other relative rights, and property rights." 2 Cyc. 89, and authorities cited.

In the same volume, at page 108, it is said: "So, also, it has been held that an alien might maintain an action for statutory damages or penalty for death by wrongful act." Many of the cases bearing on that question are there referred to.

Alien friends are included in our statute of descents, and by section 43 of the Code are permitted to acquire by purchase or descent, and hold and transmit, real estate, in the same manner and to the same extent as a citizen. These statutes indicate an intention on the part of the legislature to extend rather than abridge the liberal policy of the common law with respect to aliens.

An examination of the authorities relied on to sustain the overruled plea shows that the decisions are controlled by the status of the parties entitled to the recovery in an action for death by wrongful act, rather than by that of the decedent in his lifetime. The distinction is sharply drawn between the rights of nonresident and of resident relations of the deceased.

Thus, in the leading case of *McMillan* v. *Spider Lake etc. Co.*, 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947, it is held that nonresident alien relations of the deceased are not entitled to the benefits of the Wisconsin statute giving a right of action in such case. This case reviews the authorities, English and American, on the subject, and in all of them the above-mentioned distinction seems to be observed.

So, also, in the case of *Deni* v. *Pennsylvania R. Co.*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676—a case much relied on by the defendant—it is said that "a nonresident alien mother has no standing to maintain an action against a citizen of Pennsylvania to recover damages for the death of her son." The opinion pro-

ceeds: "Our statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the provisions of it. While it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit of the statute that we cannot adopt it."

The weight of authority in this country, however, maintains the right even of nonresident alien relatives of the deceased to receive the benefit of these statutes.

In the case of *Mulhall* v. *Fallon,* 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309, Holmes, C. J., in delivering the opinion of the court, observes: "One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon nonresident aliens, *Deni* v. *Pennsylvania R. Co.,* 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676; *Brannigan* v. *Union Gold Mine Co.* (C. C.) 93 Fed. 164. But compare *Knight* v *West Jersey R. Co.,* 108 Pa. 250, 56 Am. Rep. 200. On the other hand, in several states the right of the nonresident to sue is treated as too clear to need extended argument. *Philpot* v. *Missouri Pac. R. Co.,* 85 Mo. 164; *Chesapeake etc. R. Co.* v. *Higgins,* 85 Tenn. 620, 4 S. W. 47; *Augusta Ry. Co.* v. *Glover,* 92 Ga. 132, 18 S. E. 406; *Luke* v. *Calhoun County,* 52 Ala. 115. . . . . In all cases the statute has the interest of the employes in mind. It is on their account that an action is given to the widow or the next of kin. . . . We cannot think that workmen were intended to be less protected if their mothers happen to live abroad. . . . In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in." See, to the same effect, *Kellyville Coal Co.* v. *Petraytis,* 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191.

None of these cases question the right of resident aliens (by which is meant aliens domiciled in the Unted States, in contradistinction to those residing in foreign countries) to the benefit of these statutes.

In this case, if the averments of the plea were sufficient to present

the issue intended to be raised, the evidence shows that the widow and one of the children of the deceased reside in the state of West Virginia. The question, therefore, of the right of a nonresident alien to maintain this action, does not arise, and upon that question no opinion need be expressed. But the right of a resident alien to the benefits and remedies afforded by sections 2902 and 2904 of Va. Code 1904 is sustained by authority, and is in accordance with sound policy and justice, and this court has no hesitancy in upholding it in the present case.

The third assignment of error is in respect to the rule of the court in giving the four instructions asked for by the plaintiff.

These instructions enunciate no new principles, they correctly propound the plaintiff's theory of the case, and there was evidence tending to sustain them. Upon familiar principles, therefore, they were properly given.

With regard to the instruction as to what constitute proper elements of damage in this class of cases, it is conceded that the in-instruction conforms to the decisions of this court; but a different rule is invoked, as being, it is alleged, more in harmony with the weight of authority in other states.

It is sufficient to say that the court has recently had occasion to consider that question, and no sufficient reason is perceived to justify a departure from its own precedents. *Portsmouth St. R. Co.* v. *Peed's Adm'r*, 102 Va. 662, 47 S. E. 850.

The instructions given by the court, as a whole, correctly and fairly submitted the law of the case to the jury, and a more detailed notice of them would be unprofitable.

The gravamen of the charge in the third count of the declaration —the one that presents the controlling issue in this case—was the negligent failure of the defendant, on the morning of the accident, to notify plaintiff's intestate that connecting mines with the one in which he was accustomed to work were on fire, and of the consequent danger of entering that mine. The significance of that allegation will be appreciated in considering the fourth and last assignment of error, namely, tne action of the court in overruling the motion of the defendant to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence.

The salient facts, which for the purposes of this appeal must be taken as true, are as follows: In November, 1901, and for a

number of years prior thereto, the defendant operated extensive coal mines in the vicinity of Pocahontas. The mines particularly referred to in the record are the New Baby mine, the Old Baby mine, and the West mine, lying parallel and contiguous to each other, and in the order named. The territory occupied by these mines is three miles in length and a mile and a half in width, and embraces a surface area of 3,000 acres. The map exhibited with the record discloses a perplexing labyrinth of entries, cross-entries, air courses, and traveling ways, some of which are several miles in length, and extend entirely through the mountain. These passages are ventilated by two suction fans, located respectively near the mouths of the fan entries of the New Baby mine and the West mine. The New Baby mine is located about a half a mile from the town of Pocahontas, and the distance from the drift mouth of that mine to the drift mouth of the West mine is between a half and three-quarters of a mile. The Old Baby mine had been abandoned, and its main passageway, for the distance of 900 feet, is used as the approach to the New Baby mine. The passageway to the former near the junction of the two mines was closed with a wooden brattice, which separated the old mine from the new.

On November 14, 1901, at 3 o'clock in the morning, a fire was discovered in the fan of the New Baby mine, which was extinguished in about one hour, but the fan was disabled and not operated again that day. About four o'clock a large fire was discovered in a pile of coal at the junction of the Old Baby mine and the New Baby mine, and three other fires were also found burning in the courses leading to the burnt fan. At five o'clock there was an explosion in the burning mine, which destroyed the brattice referred to, and afforded an outlet for gases and smoke into the Old Baby mine, whence they were carried through crosscuts to the higher levels of the West mine. The origin of these fires is unknown, nor is it material, in the view which the court takes of the case.

It was a rule of the company to issue checks to its employes every morning from a check office located near the Baby mine. These checks were slips of paper with which the miners tagged loaded coal cars, so that each might receive credit for the number of car loads of coal to which he was entitled.

On the morning of the accident, plaintiff's intestate with his

brother and a miner named Sprengoski, set out from their home, in Pocahontas, to go to their place of work, at about twenty minutes to six o'clock; and, having received their checks, at the usual hour—about 6:15 o'clock—entered the West mine at the main entrance. After proceeding some distance in the mine, they discovered smoke, but Sprengoski, who was an experienced miner, was unable to determine whether it came from the loca—a small steam engine used in hauling coal cars in and out of the mine—or from the adjoining mine.

Shortly after these men had gone in to their work, one of the company's mining engineers, who had been ordered by the superintendent to ascertain the condition of the West mine, met and turned back twenty or thirty men, miners and mule drivers, who had entered the mine, and it was not until after that occurrence that a man was stationed at the drift mouth to warn people of the danger.

Plaintiff's intestate had no knowledge of these fires. He had only been in the service of the company three or four months, and his work had been confined to a section of the mine known as "Gray Heading," two and one-quarter miles from the drift mouth of the main entry. Sprengoski worked at Ft. Wayne, which is a shorter distance from the drift mouth than Gray Heading, and the Rukas brothers parted with him at that point. When that part of the mine began to fill with gas and smoke, he escaped through an opening near his place of work,with which he was familiar, while the Rukases sought safety in flight along the route by which they had entered—the only one known to them—but were overcome before reaching the outside, and perished.

As observed, the officials of the company learned of the condition of affairs at the mines soon after the first fire was discovered; and, after extinguishing the fire at the fan, they had been in vain attempting to control the fire in the Baby mine for some two hours before plaintiff's intestate and his companions entered the West mine. They knew that several hundred men composed the day shift in that mine, and that their hours of labor commenced between six and seven o'clock. They also knew, or in the exercise of ordinary care ought to have known, of the dangerous consequences likely to result from an uncontrollable fire in a gaseous coal mine to an adjoining mine on a higher level, and connected by crosscuts with

the burning mine. Such conditions imperatively demanded prompt measures for the safety of employés.

The duty of the defendant to warn plaintiff's intestate of the changed conditions and the certain peril to which he would be exposed by continuing to work in the mine is corollary to the primary duty of exercising ordinary care to furnish him a reasonably safe place in which to work in the first instance. The main principle has repeatedly received the sanction of this court, and the subordinate proposition seems also to be well settled.

The doctrine is stated as follows by Shearman & Redfield: "The master must therefore give warning to his servants of all perils to which they will be exposed, of which he is or ought to be aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incidental to the business, in the natural and ordinary course of affairs, though more than this is not required of him." 1 Shearman & Red. on Neg. (5th ed.) sec. 203.

In note 5 to that section it is said: "An employer is bound to give notice of latent dangers among which the employé is required to work, and of which the employer has knowledge."

See, also, 1 Labatt on Master and Servant, sec. 240; *Galveston etc. R.* v. *Garrett* (Tex. Sup.) 13 S. W. 62, 15 Am. St. Rep. 781; *Parkhurst* v. *Johnson* (Mich.) 15 N. W. 107, 45 Am. Rep. 28; *Smith* v. *Peninsular Carworks* (Mich.) 27 N. W. 662, 1 Am. St. Rep. 542; *McDonald* v. *Chicago etc. R. Co.* (Minn.) 43 N. W. 380, 16 Am. St. Rep. 711; *Johnson* v. *First Nat. Bank* (Wis.) 48 N. W. 712, 24 Am. St. Rep. 722

In *Michael* v. *Roanoke Mach. Works,* 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927, this court says: "Accordingly the servant has a right to assume, when placed in a situation of danger, where engrossing duties are required of him, that the master will not, without proper warning, subject him to other perils unknown to him, and from which the work exacted necessarily distracts his attention."

The questions of negligence and contributory negligence were submitted to the jury upon correct instructions, and, viewing the case from the standpoint of a demurrer to the evidence, the evidence is quite sufficient to establish the fact that the negligence of the

defendant was the proximate and efficient cause of the death of plaintiff's intestate.

The judgment of the circuit court is without error, and must be affirmed.

NOTE.—The right of the personal representative of a resident alien to bring an action under secs. 2902-2904, for his wrongful death for the benefit of a resident alien widow and children, residing in another State, is affirmed in the second head-note to the above case. The plea of the defendant (not sustained by the evidence) raised the question of the right of the personal representative of an alien to maintain such an action. In *Cleveland C. C. & St. L. Ry. Co.* v. *Osgood*, decided Feb. 16, 1905 (73 N. E. 285), the Appellate Court of Indiana held that under a similar statute an administrator appointed in Indiana might sue to recover for the death of a resident, although the ultimate distribution of the proceeds of the action would go to non-resident aliens, *where the laws of the country in which such alien resided authorized a similar recovery in favor of alien next of kin.* As the reasoning of the court in the Indiana case coincides with that in the principal case and is a clear and able presentation of the objects of the statute, we quote the opinion of Roby, J , *in extenso* upon this point:

"The primary question for decision presented by the assignment of error that the court erred in overruling appellant's motion for a new trial is whether such action lies when the beneficiaries designated by the statute are aliens, as the next of kin were. The question does not seem to have been decided in Indiana, and there is a hopeless conflict of authority in other states. Our statute corresponding to 'Lord Campbell's Act' is as follows: 'When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he or she (as the case may be) lived, against the latter for an injury for the same act or omission. The action shall be commenced within two years. The damages cannot exceed ten thousand dollars; and must inure to the exclusive benefit of the widow, or widower (as the case may be) and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.' Laws 1881, p. 241, sec. 8, as amended by Acts 1899, p. 405, c. 177. The purpose of this legislation was to provide for some pecuniary compensation to be made by one person for taking the life of another, which before this enactment, he could not have been required to make. The right to maintain the action is vested in the personal representatives of the deceased. Had the provision gone no further the fund recovered would have been simply assets of the estate, to be disposed of as other assets. The legislature, having the right to determine what disposition should be made of the fund, charged it with the express trust that it must inure to the benefit of the widow and children, if any, first, and, if no widow or children, then to the next of kin. *Jeffersonville etc.* v. *Hendricks*, 41 Ind. 48-74; *Memphis etc.* v. *Pikey*, 142 Ind. 304-311, 40 N. E. 527. The action is brought by the administrator in his representative capacity. *Clore* v. *McIntire*, 120 Ind. 262-264, 22 N. E. 128. The widow, children, and next of kin are not parties, have no right to be parties, and have no right to compromise or control the action.

Yelton v. *Evansville etc. Co.*, 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158; *Pittsburg etc. Co.* v. *Moore*, 152 Ind. 345-357, 53 N. E. 290, 44 L. R. A. 638. The damages recovered are by the terms of the statute 'distributed in the same manner as personal property of the deceased.' The disability of aliens at common law in respect to the ownership of real estate did not extend to personal property, and aliens were capable of acquiring, holding, and transmitting movable property in like manner as citizens. *Kannreuther* v. *Geiselbrecht*, 28 Ch. D. 175; *Milne* v. *Moore*, 24 Ont. 456; *Bradwell et al.* v. *Weeks' Adm'r*, 1 Johns. Ch. 206; 2 Am. & Eng. Ency. Law (2d Ed.) p. 81. The common-law rule has neither been abrogated nor narrowed by any statute of this state. It is difficult to perceive why there should be greater reluctance in making distribution to an alien widow and children or next of kin to the deceased than in distributing to them in the same manner the proceeds of personal property owned by him. The statute is broad and conclusive in terms. No exception is made where the beneficiaries named are aliens. To deny the action because the widow, children, or next of kin are aliens and non-residents is to incorporate into it a restriction which it does not contain. *Bonthron et. al.* v. *Phœnix etc. Co* (Ariz.), 61 L. R. A. 563; *Tanas* v. *Municipal Gas Co.* (Sup.), 84 N. Y. Supp. 1053-1059. Where the decedent and the administrator were both residents and citizens of Kentucky, and the contention was that the statute applied exclusively to residents of Indiana, the Supreme Court held that the language of the Act was so clear and explicit that the question could not arise; that the only condition imposed by the legislature which must exist as a prerequisite to the maintenance of the action is that the decedent might have maintained one himself had he lived, and added: 'They [the legislature] have not said that the right shall exist only in cases where the deceased was at the time of his death a resident or citizen of Indiana; but, given the fact that the death of one has been caused by the wrongful act or omission of another, they leave for the courts solely the inquiry whether, had the injury not been fatal, the injured party could himself have recovered therefor. The above section of the Code does not limit the remedy provided for causing the wrongful death of another to resident citizens of this state, and we possess no power to thus limit the operation of the section.' *Jeffersonville etc. Co.* v. *Hendricks*, 41 Ind. 71, 74. Much less can a legislative intent be implied to exclude from the operation of the statute Indiana administrators bringing suit to recover on account of the death of a resident of the state because the ultimate distribution of the proceeds of such action may be made to a non-resident alien. The statute is a remedial one. *Stewart* v. *B & O. etc. Co.*, 168 U. S. 445, 18 Sup. Ct. 105; 42 L. Ed. 537; *Bonthron* v. *Phœnix etc. Co.*, *supra*; *Lang* v. *Houston etc.*, 27 N. Y. Supp. 90; *Id.* 144 N. Y. 717, 39 N. E. 858. The essence of the Act is found in that part of it which confers a right of action, and not in that part which provides who shall bring it, or how the fund recovered shall be distributed. Its tendency is to induce care and make human life more secure—considerations of policy which are not affected by the alienage of the beneficiary. The right of personal security does not depend upon whether the individual's wife and children happen to live abroad. *Mulhall* v. *Fallon*, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309. The wrongful act of the defendant forms the basis of the right. It is not, therefore, material, in connection with the question now under consideration, whether the statute

gives a new right to the administrator (*Pittsburg etc.* v. *Hosea*, 152 Ind. 412, 53 N. E 419) or provides for the survival of the right possessed by the decedent. The Supreme Court of Wisconsin, in *McMillan* v. *Spider Lake etc.*, 91 N. W. 979, 60 L. R. A. 589, wholly overlooked the identity of the fact forming the substance of the action and denied recovery upon a purely artificial ground.

The point is made that such a suit *mutatis mutandis* does not lie in the courts of Great Britain. This court is disposed to adopt the rule of reciprocity, and an interpretation of the English authorities is therefore essential. In England, as in America, there is no right by the common law to recover damages for injuries resulting in death; but in both countries statutes have been passed to remedy this defect; the English statute commonly known as 'Lord Campbell's Act' furnishing the model for those adopted in the States The point that *mutatis mutandis* the action here prosecuted would not lie in England because of the alienage of the plaintiff is based upon the judgment of Mr. Justice Darling in the case of *Adams* v. *British Foreign Steamship Company* (1898), 2 Q. B. 430. In that case the learned judge said: 'But it is a principle of our law that Acts of Parliament do not apply to aliens, at least if they be not even temporarily resident in this country, unless the language of the statute expressly refers to them.' In the case then being considered the mother of a Belgian alien was seeking to recover damages for his death, caused by a collision on the high seas between the Belgian ship upon which the deceased was employed and a British ship, through the negligence of the latter. In giving his judgment the justice said: 'Now, I ask is there anything in Lord Campbell's Act to show that it was intended to apply for the benefit of foreigners not resident in this kingdom? . . . I see no implied, and certainly no express, intention to give to foreigners out of the jurisdiction a right of action which even British subjects had not until the passing of 9 & 10 Vic. c. 95. Moreover, that statute provides for the division of the damages recovered amongst the various persons to be benefited in proportions to be assessed by the jury. It appears to me impossible to hold that it was intended to cast upon juries such a duty as this in regard to the distant family of a deceased and possibly polygamous alien.' The effect of this judgment is to establish a precedent that, where an alien is out of the jurisdiction at the time the injuries resulting in his death occurred, his personal representative cannot recover therefor under Lord Campbell's Act. The case, however, is very different where the alien is within the jurisdiction when the accident occurred. The test of the question is the jurisdiction of the court. In *The Zollverein*. 2 Jur. (N. S.) 429, Dr. Lushington said: 'The power of this country is to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further.' The same view is expressed by Lord Esher in *Colquhoun* v. *Heddon*, 25 Q. B. 129, at page 135, and Jervis, C. J., in *Jeffreys* v. *Boosey*, 4 H. L. C., at page 946. The recent case of *Davidson* v. *Hill* (1901), L. R. K. B. Vol. 2, p. 606, reviews many authorities, and directly holds that under Lord Campbell's Act an action will lie against a British subject for negligently causing the death of a person within England, his next of kin being aliens. The rule of reciprocity, if adopted in this case, would therefore require that the benefits of section 285 be extended to the non-resident next of kin of the deceased, he having been within the jurisdiction of this state at the time the fatal accident occurred. This conclusion accords with the dictates of natural justice and of

that enlightened policy essential to the commercial and social progress of the nation. It is also supported by the clear weight of American authorities, of which the following are a portion: *Mulhall* v. *Fullon, supra*; *Vetaloro* v. *Perkins* (C. C.), 101 Fed. 393; *Kellyville* v. *Petraytis*, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191; *Renlund* v. *Mining Co.* (Minn.), 93 N. W. 1057; *Augusta etc. R. Co.* v. *Glover*, 92 Ga. 142, 18 S. E. 406; *Luke* v. *Calhoun*, 52 Ala. 115; *Bonthron* v. *Phœnix etc. Co., supra*; *Tanas* v. *Municipal Gas Co., supra.*"

The differences between the Indiana statute and ours are not of such a character as to make the above reasoning inapplicable in Virginia.

C. B. G.

SEABOARD & R. R. CO. v. VAUGHAN'S ADM'X.

Supreme Court of Appeals of Virginia.

June 15, 1905.

[51 S. E. 452.]

1. RAILROADS—*Crossing accident—Negligence—Contributory negligence—Question for jury.*—In an action against a railroad company for injuries to a bicycle rider at a crossing, *held*, that plaintiff was guilty of contributory negligence.
2. RAILROADS—*Persons near track—Care required.*—Where one riding a bicycle, on reaching a railroad crossing, turned his wheel and rode in the open space, ten to twelve feet wide, between the tracks where persons did and could ride with safety, it was not a circumstance which showed that he was in peril, or made it the duty of the operatives of an approaching train to stop the train to avoid injuring him, because he might possibly fall or be thrown upon the track.

   [Ed. Note.—For cases in point, see Vol. 41, Cent. Dig. Railroads, secs. 1080-1083.]
3. TRIAL—*Instructions*—Where the instructions given, or which the court has determined to give, are sufficient to submit the case fairly to the jury, it is under no obligation to give additional requested ones, though they be correct.

   [Ed. Note.—For cases in point, see Vol. 46, Cent. Dig. Trial, secs. 651-659.]
4. RAILROADS—*Trespassers—Care required.*—A trespasser on a railroad right of way is not entitled to more than ordinary care on the part of the operatives of a train not to injure him.

   [Ed. Note.—For cases in point, see Vol. 41, Cent. Dig. Railroads, sec. 1238.]

Error to Circuit Court, Norfolk county.

Action by Rosa A. Vaughan, as administratrix of the estate of Benjamin F. Vaughan, deceased, against the Seaboard & Roanoke